

NTSB Order No.
EM-117

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 11th day of December, 1984

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

JAMES N. ELLIOTT, Appellant.

Docket ME-105

ORDER DENYING RECONSIDERATION

By Order EM-114, served September 21, 1984, the Board granted a motion by the Commandant to dismiss the notice of appeal filed in this proceeding as untimely under its Rules of Procedure for Merchant Marine Appeals from Decisions of the Commandant. See 49 CFR Part 825. Appellant did not file a response to the Commandant's motions. Now the appellant, by petition filed September 28, requests that we reconsider that dismissal.¹ For the reasons that follow we will deny the request.

In his request for reconsideration appellant asserts, in effect, that the untimeliness of his notice of appeal, which was filed over four months late, should be excused because "from November 19 I was seriously ill" and he did not learn of the Commandant's decision, served on appellant's counsel on December 1, 1983, until after he returned home on January 18, 1984, following a hospitalization ² At that time, according to appellant, his wife

¹On October 16, 1984, we received an undated motion for reconsideration of NTSB Order EM-114 which was submitted by the attorney who filed appellant's late notice of appeal. The motion supplements the information contained in appellant's handwritten petition. Neither request for reconsideration refers to the other.

²Appellant's petition does not specify the date he entered the hospital or the date in January, 1984, he returned home. The motion for reconsideration filed on his behalf by his new attorney asserts that appellant entered the hospital on December 12, 1984. The hospital stay involved a kidney disorder that resulted in a nephrectomy.

informed him of the Commandant's decision of November 25, 1983 (in Appeal No. 2331) and of his original attorney's advice that he would not pursue any further appeal due to appellant's inability to pay for his continued services.³

Although it might appear that appellant had adequate justification for not filing the notice of appeal within 10 days after service of the Commandant's decision, the notice of appeal was not filed until April 3, 1984, more than two months after appellant acknowledges that he became aware of the disposition of his appeal to the Commandant. Since it does not appear and is not contended that appellant's medical condition upon his return home in mid-January prevented him from promptly filing the required notice, the fact that previously he had been ill and hospitalized does not establish good cause for the subsequent delay in filing the notice.⁴

ACCORDINGLY, IT IS ORDERED THAT:

The request for reconsideration in the petition of September 28, 1984 and in the motion received by the Board on October 16, 1984 are denied.

BURNETT, Chairman, GOLDMAN, Vice Chairman, and BURSLEY, Member of the Board, concurred in the above order.

³This attorney had represented appellant in the evidentiary proceeding before the Coast Guard administrative law judge and on appeal from the law judge's decision to the Commandant. The notice of appeal that eventually was filed with the Board was prepared by a Norfolk, Virginia legal aid society attorney.

⁴Moreover, to the extent that withdrawal of counsel may have played a role in appellant's delay in pursuing his appeal rights, appellant could have sought either an extension of time for filing the notice so that he could enlist a new attorney or advice from the Board at an early date on how to proceed without such assistance. In the latter connection, we would point out that our rules of procedure set forth detailed information on what a notice of appeal must contain and where it should be filed.